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IN THE

Supreme Court of the United States

No. 74-1495

FLORENCE G. SHEFNER,
Petitioner,

vs.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,
Respondent.

SUPPLEMENTAL ADDENDUM

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SUPPLEMENTAL ADDENDUM

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

MRS. IRMA W. FULBRIGHT,

Plaintiff,

vs.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, CASPAR H. WEINBERGER, United States of America,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court upon the parties' cross-motions for summary judgment. Since only issues of law concerning a review of the final decision of the Secretary of Health, Education and Welfare is involved, this action is in a proper posture for judgment. *Clevenger* v. *Weinberger*, 375 F.Supp. 821 (W.D., Mo., 1974).

This is an action under Title II of the Social Security Act, as amended, codified at 42 U.S.C. §401 set seq. This review is pursuant to §405(g).

On March 11, 1971, plaintiff filed her application for retirement (old-age) insurance benefits as provided in §402 (a) of the Act. Based on her earnings record at that time, plaintiff received the sum of $4,624 in benefit payments for the months of January, 1971, through February, 1973. In a "Notice of Determination of F.I.C.A. Wages" dated

February 20, 1973, plaintiff was informed that wages reported to her record as an employee of a corporation were exempt from coverage, since such services were performed for her spouse, who, it had been determined, was self-employed. Plaintiff's claim was reconsidered and she was informed that her wages for 1968, 1969 and 1970, were not "wages" within the meaning of the Social Security Act. The time limitation for correcting the 1968 wages had expired, but all wages reported to her record for 1969 and 1970 were removed. This left plaintiff with insufficient quarters of coverage to qualify for entitlement. She was terminated effective March of 1970. She was also informed that she must refund her overpayment of $4,624.00.

On March 7th and 8th, 1974, at plaintiff's request, a hearing was held in which she appeared and testified. Plaintiff was represented by counsel and her husband also appeared and testified on her behalf.

On March 12, 1974, Administrative Law Judge rendered a decision unfavorable to plaintiff. He concluded that the plaintiff did not meet the insured status requirements for retirement (old-age) insurance benefits and that she had been overpaid $4,624.00. He further determined that plaintiff was not without fault in receiving such overpayment and is therefore liable for the amount of the overpayment. He based his conclusion on the finding that plaintiff's husband did not operate his real estate business as a corporation but, rather, was self-employed.

The Appeals Council of the Social Security Administration affirmed the decision of the Administrative Law Judge. Thus, the decision of the Administrative Law Judge stands as the final decision of the Secretary.

The two issues presented to this Court for review are:

Was the Social Security Administration correct in their determination that plaintiff's employment by the Wilbur L. Fullbright Realty Company was service in the employ of her spouse? And was the Social Security Administration correct in their determination that plaintiff was at fault in receiving old age insurance payments?

The scope of review in an action such as the one presently at bar is that the reviewing court is required to uphold the Secretary's decision even if it disagrees with it, so long as that decision is supported by substantial evidence. *Blalock* v. *Richardson*, 483 F.2d 773 (4th Cir., 1972).

Defendant Secretary has filed with the Court a transcript of the administrative hearings before the Social Security Administration which provides the factual basis for this review.

The facts indicate that plaintiff worked for the Wilbur L. Fullbright Realty Company from 1959 to 1970, but was not paid for her services prior to 1968 because of lack of company funds. Plaintiff is also a director of the company and holds the office of secretary. During the years, 1968 through 1970, plaintiff worked every day performing secretarial duties such as typing and record-keeping. Plaintiff stated that she received her salary of $7,800 annually in one lump sum. During the same period, the company had one licensed salesman named Fred Stephenson. Plaintiff's husband also sold property for the company.

The Wilbur L. Fullbright Realty Company was issued a real estate corporation license from the State of Missouri for the years, 1968 through 1970. Plaintiff's husband was licensed by Missouri as a real estate officer from 1968 through 1970. For the same years, the company also paid corporation franchise taxes and filed anti-trust affidavits

with the Missouri Secretary of State. All property listing agreements were signed by plaintiff's husband, as president of the company.

Prior to 1959, the company was jointly owned by Mr. Mohrman and plaintiff's husband. Mr. Mohrman withdrew from the company on June 16, 1959, and thereafter the only owners of stock in the company were plaintiff and her husband. Plaintiff stated that she was appointed to the office of secretary and director by her husband at an informal meeting in 1959. She stated that she owns 50% of the stock, but could not state how many shares she owns. She stated that no subsequent meetings were held except those described by plaintiff as informal meetings between her husband and herself. Plaintiff was not even sure whether stock certificates had actually been issued. No formal records were kept of any meetings.

Plaintiff testified that her husband's salary was assigned before she became involved in the company. Although no records were made of that decision, it was stated that the decision to pay her was made between her husband and herself. Her husband's salary was based on a commission for the business he brought in and he received no salary for being director or president of the company. Everything he was paid went through the company books.

Wilbur L. Fullbright, plaintiff's husband, stated that he was elected president of the original company on October 1, 1940, and has continued in that position since that time. He stated that the company has always maintained its status as a Missouri corporation and has filed all required forms, tax returns and reports. Mr. Fullbright stated that stock certificates had been issued and were kept in a safe at the company.

Plaintiff's husband testified that the corporation employed a Mr. Stephenson as a salesman. He was paid on a commission basis through the corporation. Mr. Fullbright stated that the corporation maintains a separate bank account. He stated that all the decisions for the company are made by the plaintiff and himself, although he admitted that he was the more influential. He testified that the decision to pay plaintiff a salary was based on the fact that the company had enough money to do so. The decision was arrived at informally, and the amount of $7,800 was arrived at because it was the maximum wage credit for social security purposes. He added that he wanted to pay plaintiff an income to establish social security eligibility.

In 1970, the gross earnings of the corporation were $4,-846.80, but plaintiff was still paid $7,800. Mr. Fullbright stated that he paid the corporation $7,800 in cash in 1970 from his and plaintiff's personal bank account in order to pay plaintiff. He stated that he owed the corporation certain amounts for past advances. He stated there was no meeting held on this subject. Mr. Fullbright testified that the money paid to plaintiff in 1970 was taken out of their joint account and put into the corporate account; then it was paid back to plaintiff where it was again placed in their personal joint account. Mr. Fullbright also stated that he received a substantial salary in 1968 for his services as an officer and salesman, but received nothing in other years. Mr. Fullbright testified that he filed his federal tax returns for the years, 1960 through 1967, as a self-employed individual. During this period, he stated that all monies were still channeled through the corporation, but that he filed as a self-employed individual so that his social security taxes would be lower. Plaintiff's husband also testified

that he personally is not licensed as a broker but only as an officer of the corporation. The company, as a corporation, holds a broker's license.

Plaintiff has cited cases standing for the proposition that the formation of corporate entities for the purpose of establishing eligibility for social security benefits is not improper, and that employment of one's spouse or family member by the corporation will not disqualify the spouse or family member from receiving benefits. *Stark* v. *Flemming*, 283 F.2d 410 (9th Cir., 1960); *Brannon* v. *Ribicoff*, 200 F. Supp. 697 (D.C. Mont., 1961); and *De martinez* v. *Gardner*, 291 F.Supp. 132 (D.C. Pr., 1968). This Court agrees with the holding of the aforecited cases that a corporate entity is not to be treated as a sham merely because the Secretary of Health, Education and Welfare seeks to do so. However, in the above cases, while the corporate entities were informally run and operated, salaries were paid on a regular basis to the parties in question, and no one declared himself a self-employed person under the income tax laws as in the present case.

The fact that plaintiff's salary was transferred from a personal account to the corporate account and back to the personal account, along with plaintiff's husband's filing of his federal income tax as a self-employed person, clearly indicates that the Wilbur L. Fullbright Realty Company was merely a shell. The decision of the Secretary to disregard such "flow-through" transactions is not an abuse of his discretion. The Secretary's determination that plaintiff's wages for the years, 1968, 1969 and 1970, were not "wages" is supported by the record. With regards to the Secretary's determination that an overpayment had been made to plaintiff, and that repayments should be made to

the Secretary, that determination will be reversed. It is this Court's opinion that such a recovery would be against equity and good conscience in the present case, 42 U.S.C. §404(b). In consequence,

IT IS HEREBY ORDERED that defendant shall have summary judgment against the plaintiff concerning any future retirement (old-age) insurance benefits under the Social Security Act; and

IT IS FURTHER ORDERED that plaintiff shall have summary judgment against the defendant for any recovery of overpayments to plaintiff; and

IT IS FURTHER ORDERED that costs shall be shared equally between the parties.

Dated this 26th day of March, 1975.

/s/ H. KENNETH WANGELIN
United States District Judge